

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

26010

FILE: B-210781; B-210781.2 **DATE:** August 16, 1983

MATTER OF: Tom Shaw Inc.; Merritt Dredging
Company

DIGEST:

1. Protest that agency acted unreasonably in determining that emergency dredging services were needed and that only a hopper dredge could perform the work within the required timeframe is denied where the protester has not shown that the agency's conclusions are unreasonable but merely disagrees with the agency's belief that such dredging was needed and that firm using pipeline dredge could not perform within the required timeframe.
2. An agency's failure to prepare a proper determination and findings justifying sole-source negotiations is not an error affecting the validity of a sole-source award where the surrounding circumstances indicate that the award was justified.
3. Agency properly canceled solicitation after bid opening when it determined that the scope of work required under a solicitation for dredging services had substantially changed as a result of the removal of some of the material under a sole-source contract, and determined that a previously unavailable agency-owned dredge had become available to perform the remaining work.
4. Failure of contracting officer to prepare a formal written determination justifying cancellation is not a basis for sustaining a protest where circumstances necessary to support a cancellation are present.

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Tom Shaw Inc. and Merritt Dredging Company protest the sole-source award of a contract for dredging work by the Jacksonville District, Corps of Engineers and the Corps' cancellation of invitation for bids (IFB) No. DACW17-83-B-0008, a solicitation for dredging work to be performed in the same general area as the work performed under the sole-source contract. The protesters contend that the Corps failed to adequately justify the sole-source award and that it canceled the solicitation without a compelling reason to do so. For the reasons that follow, we deny the protests.

The solicitation sought bids for the emergency maintenance dredging of 467,000 cubic yards of silty sand material from the entrance and access channels of the U.S. Navy Trident Base, Canaveral Harbor, Florida. At the bid opening on December 16, 1982, Shaw was the low bidder and Merritt was second low. The Navy conducted a pre-award survey of Shaw, and based on this survey, found Shaw to be nonresponsible.

Since Shaw is a small business, on January 20 the Navy referred the matter of Shaw's responsibility to the Small Business Administration (SBA) for consideration under its Certificate of Competency (COC) procedure. While the COC process was pending, the Corps initiated preliminary contacts with Merritt, apparently with the intention to make award to Merritt in the event Shaw's COC was denied.

Meanwhile, on January 27, the Navy complained to the Corps that additional shoaling had occurred impeding its submarines' safe passage to their berths and creating an urgent situation. The Corps conducted a survey of the situation and found that new shoaling had in fact occurred in the channel area and agreed with the Navy that a critical situation existed because the new shoaling (which had reportedly increased the total amount of material to be dredged to 691,000 cubic yards) had reduced the depth and inhibited the maneuverability of the Trident submarines within the channel. Thus, on February 1, the Corps executed a sole-source letter contract with North American Trailing Company (NATCO)--the fourth low bidder under the original solicitation--requiring it to dredge 240,000 cubic yards of material within 40 days of the award date. The Corps

justifies its award to NATCO because that firm had the only available hopper dredge¹ at the time.

On February 9, the SBA's Chicago regional office notified the Corps that its staff had recommended issuing a COC to Shaw; however, since the contract value exceeded \$500,000, it was necessary to obtain the concurrence of the SBA's central office. By letter of that same day to the SBA, the Corps requested that the COC process be terminated because it had decided to cancel the solicitation. Subsequently, by letter of February 10 to the bidders, the contracting officer canceled the solicitation primarily because the increased shoaling and the emergency dredging resulted in "major changes in scope of work" and the Corps hopper dredge, which had been under repair because of a fire, would be available to perform the remainder of the work.

Essentially, the protesters first question whether there was any need for the emergency dredging and whether the Corps' restriction of that work to hopper dredges exceeded the Corps' minimum needs. They argue that the Corps has supplied no weather information supporting its claim that storms caused the shoaling build up and no engineering data, soundings or charts to verify the existence of the alleged additional shoaling. They further argue that if indeed any shoaling buildup existed, a pipeline dredge which they could provide would meet the Corps' requirement for rapid shoal removal.

¹Simply stated, a hopper dredge is a ship equipped to perform a dredging operation by making repeated passes over the area to be dredged, removing the material, and transporting the material to an ocean dumping site. By contrast, a pipeline dredge consists of a dredging machine located on a barge-like platform and connected by a pipeline to an onshore disposal site. Unlike the hopper dredge the pipeline dredge remains substantially stationary over a dredge site, removes the material at that site, and then moves on to the next site.

The contracting agency has the primary responsibility for determining its minimum needs and for drafting requirements that reflect those needs. Dynalelectron Corporation, B-198679, August 11, 1981, 81-2 CPD 115. The contracting agency, which is most familiar with the conditions under which the supplies or services have been and will be used, is usually in the best position to know the Government's actual minimum needs. Magnaco Industries, B-206191, October 15, 1982, 82-2 CPD 338. Generally, when a requirement has been challenged as unduly restrictive of competition, it is incumbent upon the procuring agency to establish support for its contention that the restriction it has imposed is reasonably related to its needs. Once the agency establishes this support, the burden is on the protester to show that the requirement complained of is clearly unreasonable. S.A.F.E. Export Corporation, B-207655, November 16, 1982, 82-2 CPD 445.

The Corps reports that its survey indicated that shoaling had occurred throughout the channel, but that in four areas inside the channel shoaling built up to such an extent that Trident submarines were not able to pass safely from their berths to the open sea. The Corps indicated that it believed that this shoaling buildup was due to "recent severe Northeasters." While it may be true, as the protesters point out, that the agency has not provided back up data to support its position that the shoaling in fact existed or was due to the weather, the protesters have been unable to show that the increased shoaling did not in fact exist. Whether or not storms caused the buildup is not significant. In the absence of any evidence contradicting the opinion of the Corps, and reportedly of the Trident base commander, that increased shoaling conditions were hampering base operations, we have no basis to question the judgment of the Corps that emergency dredging was needed.

Regarding the need for a hopper dredge, the Corps states that it required that type dredge because a pipeline dredge could not perform the critical work within the required 40 days. This was due, the Corps states, to the length of time it would take for a firm supplying a pipeline dredge to reach the dredging site, set up its pipeline, and repair the existing dikes and weirs for the

disposal site. While Merritt disagrees with the Corps' position and contends that it could have performed within 40 days, that firm has not presented evidence to show that the Corps' position is unreasonable. Under these circumstances, we also have no basis to question the Corps' judgment that it needed a hopper dredge to perform the dredge within the required time.

Turning to the propriety of conducting this procurement on a sole-source basis, we note that negotiated procurements must be conducted on a competitive basis to the maximum practicable extent. 10 U.S.C. § 2304(g) (1976); Defense Acquisition Regulation (DAR) § 3-101(d). Noncompetitive (sole-source) acquisitions may be authorized, however, when the work or supplies required can be furnished by only one source. There may be only one source for any of several reasons--because the items or services needed are unique; time is of the essence and only one source can meet the Government's needs within the available time; data that would be needed to permit a competitive procurement is unavailable and cannot be obtained within the time available; or only a single source can provide an item that must be compatible or interchangeable with existing equipment. RQLM Corporation and Fisk Telephone Systems, Inc., B-202031, August 26, 1981, 81-2 CPD 180. While we subject sole-source procurements to close scrutiny, R & E Cablevision, B-199592, February 19, 1981, 81-1 CPD 110, we will not object to such an acquisition if there is a reasonable basis for it. Winslow Associates, 53 Comp. Gen. 478 (1974), 74-1 CPD 14.

Here, prior to awarding the sole-source contract the Corps prepared a Determination and Findings (D&F) entitled "Authority to Negotiate an Individual Contract" that justified negotiation for the dredging services on the ground that "the public exigency will not permit the delay incident to formal advertising." A D&F based on the "public exigency" exception at 10 U.S.C. § 2304(a)(2) to the requirement for formal advertising, however, is generally inadequate to justify negotiation with only one source. Non-Linear Svstems, Inc.; Data Precision Corporation, 55 Comp. Gen. 358 (1975), 75-2 CPD 219. Nonetheless, where, as here, the circumstances surrounding the procurement justify making a sole-source award, an agency's failure to

prepare a proper D&F is not an error that affects the validity of the award. See Starlight Components, Inc., B-194367, December 5, 1979, 79-2 CPD 390.

The Corps states that it determined that NATCO was the only firm with a hopper dredge that was capable of performing the critical dredging work within the required timeframe. Neither protester has shown that this determination was unreasonable, nor has either contended that it could have supplied a hopper dredge. Under these circumstances, we believe that the Corps' decision to award a sole-source contract was proper. See Amray, Inc., B-209186, June 30, 1983, 83-2 CPD _____.

Merritt also contends that the Corps was obligated to negotiate with it for the emergency dredging because it had bid on the original solicitation. This contention is without merit, since the protester has not shown that it could have supplied a hopper dredge. Further, while Merritt contends that the Corps' contacts with it regarding its ability to perform the work required by the original solicitation was "part of an obvious plan to preclude a protest before award of the sole-source contract," Merritt has not produced evidence to support this contention. Therefore, we consider the allegation purely speculative and without merit. See Consolidated Services, Inc., B-206413.3, February 28, 1983, 83-1 CPD 192. In any event, we do not believe that it is improper or unusual for an agency to hold preliminary discussions regarding matters of responsibility with the second low bidder pending the outcome of the low bidder's COC proceedings.

Merritt argues that even if the award to NATCO was proper there was no compelling reason to cancel the solicitation since a substantial proportion of the material originally specified in the solicitation still remained to be dredged after the sole-source work was completed. It argues that any differences in the remaining amount and the amount originally specified could be accommodated under the "Variations in Estimated Quantities" clause of the solicitation. It also contends that the contracting officer failed to prepare a written determination supporting his decision to cancel the solicitation as required by DAR § 2-404.1(b). Shaw takes essentially

the same position as Merritt in addition to arguing that the Corps' action improperly interfered with SBA's COC process.

The Corps' letters to the bidders notifying them of the cancellation stated that its action was necessary for the following reasons:

- (1) the changes in the scope of the work to be performed, and;
- (2) the availability of a Government dredge to perform the work.

The Corps states that the scope of work described in the solicitation changed as a result of the award to NATCO because the dredging done under that contract removed most of the material located closest to the bank of the channel. It reports that this material was the easiest and most cost effective to remove. Therefore, in the Corps' opinion, bidders under the original solicitation would have had to increase their unit prices for the remaining work. The Corps contends that it would have been improper to award a contract under the solicitation with knowledge that the specifications did not accurately reflect the current conditions. Moreover, the Corps states that it was not capable of performing the work required by the solicitation with its own dredge at the time the IFB was issued, but because of the delay encountered in making an award, its dredge became available to perform the work and it determined that it would be in the best interests of the Government for the Corps to perform the remaining work with its own dredge.

Cancellation of a solicitation after bid opening and the exposure of bids is not permitted unless a cogent and compelling reason for cancellation exists. The determination as to whether such a reason exists is, however, an administrative one to which we will not object unless the protester can demonstrate that the decision was arbitrary, capricious, or not supported by substantial evidence. McGregor Printing Corporation, B-207084; B-207377, September 20, 1982, 82-2 CPD 240. The protesters have failed to make that showing here.

While Merritt asserts that the change in the overall amount of material to be dredged is not so significant as to require a change in the scope of the solicitation, it has not disputed the Corps' assertion that NATCO removed the material that was the most cost effective to dredge. Thus, we have no basis to dispute the Corps' conclusion that the emergency work necessitated a revision in the estimated amount of work and, most significantly, would likely have caused the bidders to increase their unit prices for the remaining work. This clearly constitutes a compelling reason to cancel the solicitation. Praxis Assurance Venture, B-190200, March 15, 1978, 78-1 CPD 203. Further, we cannot accept Merritt's contention that the Variations in Estimated Quantities clause of the solicitation could have been invoked to adjust the contractor's unit price to cover the reduced quantity of material. That clause was intended to operate when the conditions actually encountered turn out to be substantially different from those contemplated by the specifications. Here, where it was known prior to executing the contract that the scope of work under the contract would be materially different from that contained in the specifications, it would have been improper for the contracting officer to award a contract under the existing solicitation. McGregor Printing Corporation, supra.

Moreover, the availability of the Corps' dredge effectively rendered unnecessary the services of bidders under the solicitation. The regulations specifically provide that a solicitation may be canceled when the services to be procured are no longer needed. DAR § 2-404.1(b)(iii). Although the protesters argue that the Corps' dredge was not in fact available at the time of the February 10 cancellation, this is not relevant to the validity of the cancellation since the Corps determined that the dredge would be available to perform the required services and in fact the Corps' dredge became available on April 1. See Essex Electro Engineers, Inc., B-206012.3, October 4, 1982, 82-2 CPD 307.

While it is true, as Merritt argues, that the contracting officer did not prepare a formal written determination justifying the cancellation, this failure does not constitute a basis for sustaining a protest as long as

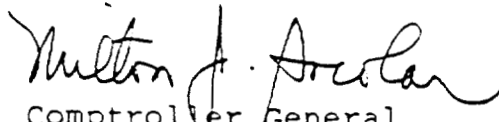
the circumstances necessary to support a cancellation are present. See Calma Company, B-209260.2, June 28, 1983, 83-2 CPD _____. Here, we have concluded that the record supports the Corps' cancellation of the original solicitation. In any event, the letters to the bidders notifying them of the cancellation clearly set forth the contracting officer's rationale for his action.

Finally, Shaw contends that the sole-source award and subsequent cancellation of the solicitation were merely devices used by the Corps to avoid awarding a contract to Shaw. It contends that the Corps did not make the sole-source award until the SBA notified the Corps of the impending issuance of a COC to Shaw. The protester also contends that it was improper for the Corps to make the sole-source award and to cancel the solicitation while the COC process was pending.

Shaw's contentions are without merit inasmuch as we have found that both the sole-source award and the cancellation of the solicitation were proper. Moreover, the record shows that the Navy had complained of the additional shoaling, and that the Corps awarded the contract to NATCO before SBA's regional office notified the Corps of the impending approval of Shaw's COC application. Finally, cancellation of the solicitation is proper, even in the face of a pending COC application, where, as here, the contracting officer has a compelling reason to do so. Baxter & Sons Elevator Co., Inc., B-197595, December 3, 1980, 80-2 CPD 414.

Shaw and Merrrit have requested reimbursement of their bid preparation costs. Since we have found that the Corps had a sufficient basis for making the sole-source award and that it acted properly in canceling the solicitation, we have no basis to allow recovery of bid preparation costs.

We deny the protests.

for 
Comptroller General
of the United States